

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

_____	x
UNITED STATES OF AMERICA,	: Criminal Action
	:
Plaintiff,	: No. 2:21-cr-00127
	:
v.	:
	:
RAYMOND DUGAN,	: *** REDACTED ***
	:
Defendant.	: APPEAL TRANSCRIPT
_____	x

TRANSCRIPT OF PRETRIAL MOTION HEARING
BEFORE THE HONORABLE JOSEPH R. GOODWIN
UNITED STATES DISTRICT COURT JUDGE
IN CHARLESTON, WEST VIRGINIA
APRIL 29, 2022

APPEARANCES:

For the Government: Julie White, Esq.
Assistant United States Attorney
United States Attorney's Office
P.O. Box 1713
Charleston, WV 25326-1713

For the Defendant: David Schles, Esq.
Suite 306
815 Quarrier Street
Charleston, WV 25301

Kimberly Kaufman, RMR, CRR, CRC
Federal Official Court Reporter
300 Virginia Street East, Room 6610
Charleston, WV 25301

Proceedings recorded by mechanical stenography; transcript
produced by computer.

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GOVERNMENT EXHIBITADMITTED

Exhibit No. 1.....17

1 PROCEEDINGS had before The Honorable Joseph R.
2 Goodwin, Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 April 29, 2022, at 10:00 a.m., as follows:

5 THE COURT: Good morning.

6 THE COURTROOM DEPUTY CLERK: The matter before the
7 Court is *The United States of America v. Raymond Dugan*,
8 Criminal Action No. 2:21-cr-00127.

9 THE COURT: Is the United States ready to proceed?

10 MS. WHITE: Yes, Your Honor.

11 THE COURT: Is the defendant ready?

12 MR. SCHLES: Yes, Your Honor.

13 THE COURT: We're here on -- for pretrial motions.

14 We have pending motions to seal and a motion to compel
15 discovery and a motion to suppress.

16 Let's begin with the motion to suppress.

17 MR. SCHLES: I'm sorry, Your Honor?

18 THE COURT: Let's begin with the motion to
19 suppress.

20 MR. SCHLES: Yes, Your Honor.

21 THE COURT: All right.

22 Ms. White.

23 MS. WHITE: Your Honor, before the burden shifts
24 to the government to defend its evidence, I believe that the
25 defense needs to make a credible challenge to the search

1 warrant. And normally we allow the pleadings to stand for
2 that, but in this case I would respectfully request that
3 defense counsel articulate on the record exactly what he is
4 challenging and on what basis.

5 And the reason I ask for that, Your Honor, is that
6 depending on what the issue is it takes us down a different
7 path of what law applies and what exceptions may be debated.

8 For instance, if the argument is simply that the search
9 warrant Judge Tinsley signed lacks probable cause, that
10 could be subject to the *Leon* good faith exception. However,
11 on the other hand, if Mr. Schles is arguing that Judge
12 Tinsley abandoned his judicial role or the affiant line,
13 well, then *Leon* would not apply in that case.

14 Because the sole purpose of the exclusionary rule is to
15 determine conduct on the part of law enforcement, it's a
16 last resort. And so we think it's important to know exactly
17 what's being challenged and why before we put a witness on
18 the stand and subject him to cross-examination.

19 THE COURT: Normally I would let the pleadings
20 stand. I think you make a good point. I've read this.

21 Let me just start it this way, Mr. Schles. The case of
22 *United States v. Bosyk*, 933 F.3d 319, at page 325 from the
23 Fourth Circuit, provides as follows and I quote:

24 The defendant argues that the government obtained its
25 warrant based on a single click of a URL, which they say

1 cannot support a search of somebody's home.

2 We disagree -- ellipses -- in short. Although the
3 search relied on a single click of an internet link, the
4 click was to a video of child pornography and circumstances
5 suggesting the person behind that click plausibly knew about
6 and sought out that content.

7 We think the magistrate judge, therefore, had a
8 substantial basis for concluding that searching the
9 defendant's address would uncover evidence of wrongdoing.

10 Distinguish that case for me.

11 MR. SCHLES: Yes, I am, Your Honor.

12 And I believe this case is distinguishable from *Bosyk*
13 because in *Bosyk* the single click was a click that opened a
14 video file, which was documented to contain known child
15 pornography.

16 So while there's a similarity here with the single
17 click aspect of it, here the single click, so to speak, all
18 the government's discovery has shown is that the user of the
19 IP address clicked and -- on May 25th. I don't have the
20 exact time, but May 25th, 2019, on a single instance. I
21 believe it was at 1409 UTC, which would be about a little
22 after 9:00 in the morning here -- accessed the -- and we're
23 going to call them the target website and the foreign law
24 enforcement agency today by agreement, Your Honor, rather
25 than the names, but that just simply the home page or the

1 front page of the website was accessed. There is no
2 evidence in the discovery that any further clicks were found
3 from that IP address, which would have navigated on the
4 target website to any files that would contain any illicit
5 materials.

6 THE COURT: What does the affidavit say about the
7 website that was accessed by that click?

8 MR. SCHLES: I'm sorry?

9 THE COURT: What does the affidavit of the officer
10 say about the target website that was clicked on?

11 MR. SCHLES: The affidavit says that the target
12 website was at the time of May 2019 operated by the foreign
13 law enforcement agency and that this foreign law enforcement
14 agency, some unidentified person associated with that
15 foreign law enforcement agency, identified the IP address
16 that was ultimately sourced to my client's home in Logan on
17 May 25th, 2019. It describes things that are found if you
18 navigate through the target website.

19 I would note that in a -- what I would say a vague and
20 general way the affidavit states that users are instructed
21 that they must create a user name and a password in order
22 to -- I think the phrase that they use is to access the
23 majority of the materials on the target website. There's no
24 evidence in the discovery that my client created a user
25 name, created a password, registered an account.

1 THE COURT: What does the officer say you get when
2 you click on that website?

3 When you access that website, what does he say about
4 that website that you access in the affidavit?

5 What did the magistrate think that click did?

6 What was given to him?

7 MR. SCHLES: That takes you to a home page, Your
8 Honor, that is found in the Bates discovery, Your Honor --
9 hold on a second -- Your Honor, it's found at Bates 398 --
10 Dugan Protected 398 to 402. There are pages that are
11 represented to be screen shots from the target website, Your
12 Honor.

13 Some of the -- it's Russian, which I do not speak, Your
14 Honor, and there's also some English. There's no child
15 pornography on these pages. There's no allusion to child
16 pornography.

17 THE COURT: I'm sorry, Mr. Schles.

18 Take me to the affidavit and tell me what the officer
19 said the click accessed, if anything.

20 MR. SCHLES: Just a moment.

21 Your Honor, in the affidavit, which begins on Bates
22 page 78, which is identified as page 18 of the affidavit,
23 under heading seven, description of the target website.

24 And it states on paragraph 15:

25 The target website is a known dark website that

1 facilitated the sharing of sexual abuse and exploitation
2 material of -- notably, it does not refer to child
3 pornography at that point. It says sexual abuse and
4 exploitation material.

5 This dark website contained child sexual abuse and
6 material. The site was a forum that facilitated the sharing
7 of child sexual abuse --

8 THE COURT: Slow down a little about.

9 MR. SCHLES: -- and exploitation material.

10 Users were required to create an account, user name and
11 password in order to access the majority of the material.

12 THE COURT: The Fourth -- I'm sorry. I just
13 interrupted you to move along.

14 The Fourth Circuit seems to say the test is did that
15 click plausibly tell the clicker that he was seeking out --
16 or suggest to the Court that the person clicking was seeking
17 out child pornography.

18 MR. SCHLES: Your Honor, when you take it to my
19 client as a specific individual, there's no evidence in the
20 affidavit whatsoever to support that. There is no
21 historical evidence of my client being involved in child
22 pornography, of a receiver, a distributor, a viewer.
23 There's no allegations that he has shown any interest in
24 children.

25 There is nothing beyond the fact that an IP address

1 associated with his account was suddenly on a single
2 occasion on a day in May of 2019 accessed a website. It
3 could have been for a split second, Your Honor. It doesn't
4 say whether he was on there a tenth of a second or a minute
5 or two minutes or ten minutes.

6 THE COURT: It's fairly implausible -- you would
7 agree with me it's implausible that someone would hit this
8 website by accident.

9 MR. SCHLES: I think there's many reasons why --
10 Your Honor, I think it is established that my client had
11 installed the Tor browser, The Onion Router, on his
12 computer, which in layman's terms is a browser that is
13 designed to facilitate anonymity on the internet.

14 And the way it works is essentially it creates a relay
15 system between a user and the website they access. The
16 information is routed through a series of intermediary or
17 relay computers that are operated by volunteers on the Tor
18 network. And the purpose of this is that the website does
19 not see the user's IP address and the user cannot see the
20 dark website's IP address.

21 The affidavit speculates -- and it's pure
22 speculation -- that someone must be seeking child
23 pornography in order to find this website. And I think they
24 used the phrase could not stumble upon it. But, Your Honor,
25 people stumble across things on the regular internet and the

1 dark website daily. You don't necessarily have to type in a
2 random series of letters and numbers.

3 Oftentimes, when you're on the internet, there are
4 links in forms, on other websites, you get pop-up windows.
5 All sorts of things that someone could inadvertently click,
6 be directed to that target website. And that's all we have
7 is one instance of the target website. There's no record
8 whatsoever of any activity from the target -- from my
9 client's computer on the target website. There's no
10 evidence.

11 THE COURT: Here didn't the foreign law
12 enforcement agency actually say in the information they
13 provided and doesn't the affidavit say that that address was
14 used to access online child sexual abuse and exploitation
15 material?

16 MR. SCHLES: It doesn't say that was done by my
17 client. It says that that is the purpose of the website,
18 but there's no -- no representation in the affidavit that my
19 client -- and I believe it's IP address 173.80.229.219.
20 There's nothing in the affidavit that says the computer user
21 using that IP address did anything involving child
22 pornography on the target website. There's just general
23 language concerning what could be found on the website by
24 people who did register.

25 THE COURT: Stop.

1 How is that different from *Bosyk*?

2 MR. SCHLES: Well, I think the difference in *Bosyk*
3 is the single click did go to a video file that -- and it's
4 described and there's no question that that was child
5 pornography. It discusses a male from the waist down with
6 what appears to be a minor. I think it's just the lower
7 body of a younger person and sexual activity.

8 THE COURT: All right.

9 MR. SCHLES: In a video here we just have --

10 THE COURT: Okay. Okay.

11 Ms. White.

12 MS. WHITE: Your Honor, thank you.

13 I think it's important to clarify a couple of things
14 that Mr. Schles has said at the outset. The Tor network
15 does not work like the regular internet that you and I --

16 THE COURT: I understand it for whatever that's
17 worth.

18 MS. WHITE: I just wanted to clarify that there is
19 no Google search. There's no index. And so --

20 THE COURT: And you said that in your papers.

21 MS. WHITE: Yes, Your Honor.

22 Thank you.

23 THE COURT: Yes.

24 MS. WHITE: And when Mr. Schles discusses "my
25 client," there's no link to his client, well, we're here

1 litigating a search warrant for the residences that the IP
2 address came back to, so we don't need to link it to
3 Mr. Dugan specifically. We need to link it to the home.
4 And there's been no challenge between the IP address and
5 that residence. So for that I don't think there's anything
6 more that the government needs to address on that.

7 But when you look at the information provided by the
8 foreign enforcement agency, it says on -- excuse me, Your
9 Honor -- 2019, 5/25, IP address was used to access online
10 child sexual abuse and exploitation material.

11 That was what was provided by the foreign law
12 enforcement agency to the FBI and then forwarded on to
13 Homeland Security to begin this particular investigation.

14 THE COURT: Okay. Stop there.

15 MS. WHITE: Uh-huh.

16 THE COURT: What's the difference there,
17 Mr. Schles, from the --

18 MR. SCHLES: Well --

19 THE COURT: Let me finish. You're very anxious
20 this morning.

21 What's the difference there from when a reliable
22 informant has provided information to the FBI in the past
23 and provides information now that he saw cocaine on a card
24 table?

25 MR. SCHLES: Well, the difference in my opinion

1 quite simply is that representation is false. There is no
2 evidence in the discovery that the user of that IP address
3 did, in fact, access child exploitation and abusive
4 material, child pornography, child erotica. There's no
5 evidence that accessed anything but the home page of the
6 target website, which does not display any of that.

7 THE COURT: Hang on just a minute.

8 We're looking for probable cause to do a search of a
9 computer that accessed a website, which I don't think
10 there's any dispute, was home to child pornography; is that
11 right?

12 MR. SCHLES: Correct.

13 THE COURT: Isn't that what the foreign law
14 enforcement said?

15 MR. SCHLES: I'm sorry, Your Honor?

16 THE COURT: Didn't foreign law enforcement say
17 that the computer located at the Dugan residence was used to
18 access a website which was the home for child pornography?

19 MR. SCHLES: I -- I believe Mr. Fleener did put
20 that in his affidavit, Your Honor, but I don't believe it's
21 correct.

22 And if we get as far as to *Leon* good faith analysis, I
23 think we will be looking at whether the affidavit contained
24 materially false information that may have misled the
25 magistrate into believing that the user of the IP address

1 did access child pornography or child exploitation and abuse
2 material when there is actually no evidence that that
3 happened.

4 THE COURT: I tell you what we're going to do.
5 I'm going to put the government to its burden.

6 Go forward.

7 MS. WHITE: Yes, Your Honor.

8 May I start with argument prior to calling a witness or
9 would you like argument at the end?

10 THE COURT: I'd just as soon hear the witnesses
11 and then the argument.

12 MS. WHITE: Yes, sir.

13 Your Honor, just so we're clear we're not proceeding
14 into a Franks hearing at this time?

15 THE COURT: You absolutely are not.

16 MS. WHITE: Thank you, sir.

17 I call Agent Fleener.

18 THE COURT: I'm just interested in addressing this
19 motion.

20 MS. WHITE: Yes, Your Honor.

21 (Witness sworn.)

22 THE COURT: Do you need some water?

23 MS. WHITE: Your Honor, I have bronchitis, but I'm
24 on antibiotics.

25 I apologize.

Special Agent Michael Fleener - Direct (White)

1 THE COURT: Do you have any water there or
2 anything?

3 MS. WHITE: Oh, no. I'm fine, sir.

4 Thank you.

5 **SPECIAL AGENT MICHAEL FLEENER, GOVERNMENT WITNESS, SWORN**

6 **DIRECT EXAMINATION**

7 BY MS. WHITE:

8 **Q.** Agent, could you state your name and employer for the
9 for the record, please?

10 **A.** My name is Michael D. Fleener, and I'm a special agent
11 with the Department of Homeland Security, Homeland Security
12 Investigations.

13 **Q.** And how long have you been in law enforcement?

14 **A.** Approximately 28 years.

15 **Q.** Is one of your responsibilities to investigate child
16 exploitation and child pornography cases?

17 **A.** Yes, ma'am, it is.

18 **Q.** Were you involved in the investigation into the
19 defendant in this case, Raymond Dugan?

20 **A.** Yes, ma'am, I was.

21 **Q.** I'm sorry?

22 **A.** Yes, ma'am, I was.

23 **Q.** And were you the affiant in the federal search warrant
24 for the residence of Mr. Dugan on [REDACTED]
25 here in Logan County, West Virginia?

Special Agent Michael Fleener - Direct (White)

1 **A.** Yes, ma'am, I was.

2 **Q.** And that warrant was executed on June 11th of 2020?

3 **A.** Correct.

4 MS. WHITE: Your Honor, may I approach the
5 witness?

6 THE COURT: Yes.

7 MS. WHITE: Your Honor, I don't believe there's
8 any objection to Government's Exhibit 1 being received under
9 seal, but we can authenticate it if Mr. Schles would like us
10 to.

11 THE COURT: All right.

12 MR. SCHLES: Yes, Your Honor.

13 THE COURT: That motion to seal is granted.

14 MS. WHITE: Thank you.

15 BY MS. WHITE:

16 **Q.** Agent, what is Government's Exhibit No. 1?

17 **A.** It's my application for a search warrant.

18 **Q.** Does that packet include your affidavit?

19 **A.** Yes, ma'am, it does.

20 **Q.** Okay. Does that packet fairly and accurately depict
21 what you presented to Judge Tinsley in June of 2020?

22 **A.** Yes, ma'am, it does.

23 MS. WHITE: Okay. We'd offer Government's 1 into
24 evidence, Your Honor.

25 THE COURT: It may be received.

Special Agent Michael Fleener - Direct (White)

GOVERNMENT EXHIBIT NO. 1 ADMITTED UNDER SEAL

MR. SCHLES: No objection.

BY MS. WHITE:

Q. Now, you executed that search warrant and you seized some electronics; is that correct?

A. That is correct, ma'am.

Q. And Mr. Dugan was interviewed on that date as well, correct?

A. Correct.

Q. Was he given his Miranda warnings?

A. Yes, ma'am, he was.

Q. Did he freely and voluntarily waive those?

A. Yes, ma'am, he did.

Q. Did he make any statements admitting to visiting multiple child pornography websites?

A. Yes, ma'am, he did.

Q. He indicated that he searched for it; is that right?

A. That is correct.

Q. Okay. With respect to the search warrant itself, could you pull out page 1 of the affidavit. We're just going to walk through it line-by-line with the Court's indulgence.

A. Okay.

Q. If you just put it right down here.

A. There you go. I'm sorry.

Q. We'll go through this first part rather quickly.

Special Agent Michael Fleener - Direct (White)

1 The first part of your affidavit is obviously the
2 introduction; is that correct?

3 **A.** That is correct, ma'am.

4 **Q.** And paragraph 1 talks about your background and
5 qualifications with investigations involving the sexual
6 exploitation of children; is that right?

7 **A.** Yes, ma'am, it is.

8 **Q.** What's that based upon?

9 **A.** My work history, work experience.

10 THE COURT: I'm fine with the officer's
11 qualifications to testify about this.

12 MS. WHITE: Thank you, Your Honor.

13 BY MS. WHITE:

14 **Q.** So we'll move forward to paragraph six, which is under
15 heading five, background of the investigation and probable
16 cause.

17 **A.** I apologize. I'm going to get this all out of order.

18 THE COURT: What page is it on?

19 MS. WHITE: Your Honor, we're going to pull it up
20 here in just a second for you.

21 THE WITNESS: Perfect.

22 THE COURT REPORTER: Ms. White?

23 MS. WHITE: Yes.

24 THE COURT REPORTER: Is your microphone on?

25 THE COURT: I'm sorry. I can't hear you.

Special Agent Michael Fleener - Direct (White)

1 MS. WHITE: Is my microphone on?

2 Yes, ma'am.

3 THE COURT REPORTER: Can you angle it a little bit
4 more towards you?

5 MS. WHITE: Is that better?

6 I'm sorry.

7 THE COURT: It's all right.

8 BY MS. WHITE:

9 Q. Now, paragraph six of that affidavit, Agent Fleener,
10 that provides an overview of your investigation; is that
11 correct?

12 A. That is correct, ma'am.

13 Q. Where does the information in that paragraph come from?

14 A. My training and experience, conversations with other
15 law enforcement agencies and officers.

16 Excuse me.

17 Q. The next heading, heading six, is called the Tor
18 network. And I think that's where we start to get into the
19 issue we're here today for.

20 Paragraphs seven through fourteen, those provide a
21 background on Tor and its hidden services, as well as the
22 fact that hidden services aren't indexed; is that right?

23 A. That is correct, ma'am.

24 Q. Okay. And where do you base that knowledge from? What
25 made you put that in the affidavit?

Special Agent Michael Fleener - Direct (White)

1 **A.** A mixture of my training and experience, my familiarity
2 with the Tor network, some information gathered from the
3 Department of Justice, Child Exploitation and Obscenity
4 Center -- or Services, excuse me.

5 **Q.** Let me stop you there. That's commonly referred to as
6 CEOS, correct?

7 **A.** Correct, ma'am.

8 **Q.** The Department of Justice --

9 THE COURT REPORTER: Excuse me --

10 BY MS. WHITE:

11 **Q.** It's the Department of Justice --

12 THE COURT REPORTER: No, I'm sorry. Can you
13 please wait for him to finish his answer before you ask the
14 question?

15 MS. WHITE: Yes, ma'am.

16 THE COURT: It's hard to understand you,
17 Ms. White, because of the mask.

18 MS. WHITE: I'm sorry, Your Honor.

19 THE COURT: If you would slow down --

20 MS. WHITE: Okay.

21 THE COURT: -- I think it will help.

22 MS. WHITE: Yes, Your Honor.

23 BY MS. WHITE:

24 **Q.** Agent Fleener, you just referenced what organization?

25 **A.** The Department of Justice, Child Exploitation and

Special Agent Michael Fleener - Direct (White)

1 Obscenity Services, I believe -- or Section, I'm sorry --
2 Obscenity Section.

3 **Q.** And we refer to that as the acronym CEOS; is that
4 correct?

5 **A.** Correct, CEOS. C-E-O-S.

6 **Q.** And CEOS is a branch of DOJ that specifically deals
7 with these types of investigations; is that right?

8 **A.** That is correct, ma'am.

9 **Q.** Did CEOS provide you a template for the affidavit you
10 submitted in this case?

11 **A.** Absolutely, ma'am. It was the bulk of the application.

12 **Q.** So you used as the starting point for your affidavit
13 that was submitted a rather large and detailed document from
14 CEOS, correct?

15 **A.** That is correct, yes.

16 **Q.** So when we get to Section seven, description of the
17 target website, and Section eight, evidence related to
18 identification of the target, paragraphs fifteen through
19 twenty-one provide a description of that target website,
20 correct?

21 **A.** That is correct.

22 **Q.** And it also says that the site was located abroad?

23 **A.** Correct.

24 **Q.** Describes the content available to the site --

25 **A.** Yes.

Special Agent Michael Fleener - Direct (White)

1 Q. -- correct?

2 A. Yes, ma'am.

3 Q. And how visitors were able to access the site; is that
4 right?

5 A. That is correct.

6 MS. WHITE: I'm going to approach the witness --

7 THE COURT: You may.

8 MS. WHITE: -- to change the page.

9 BY MS. WHITE:

10 Q. Now, specifically, Agent, paragraph 21, could you read
11 that for the Court, please?

12 A. Yes, ma'am.

13 In August 2019 a federal law enforcement agency
14 referred herein --

15 THE COURT: Slow, slow, slow.

16 THE WITNESS: I'm sorry, sir.

17 THE COURT: That's all right.

18 A. In August 2019 a foreign law enforcement agency
19 referenced herein as FLA, known to the FBI and with a
20 history of providing reliable accurate information in the
21 past, notified the FBI that this foreign law enforcement
22 agency determined that on May 25th, 2019, at 14:09:59
23 universal time IP address 173.80.229.219 was used to access
24 online child sexual abuse and exploitation material via a
25 website that the foreign law enforcement agency named -- I

Special Agent Michael Fleener - Direct (White)

1 beg your pardon -- and described as the target website.

2 Foreign law enforcement agency described the website --

3 THE COURT: I've read all this.

4 MS. WHITE: Okay.

5 THE COURT: Go ahead.

6 MS. WHITE: Thank you, Your Honor.

7 BY MS. WHITE:

8 Q. Agent Fleener, you're familiar with the documentation
9 that came from the foreign law enforcement agency; is that
10 correct?

11 A. Yes, ma'am, I am.

12 Q. Is the information in paragraph 21 essentially verbatim
13 on what the foreign law enforcement agency told you?

14 A. Yes, ma'am, it is.

15 Q. Do you have any reason to doubt the veracity?

16 MR. SCHLES: Objection. Irrelevant.

17 MS. WHITE: Well, Your Honor, it certainly goes to
18 relevance. If the affiant believed what the law enforcement
19 officer told him, that is relevant. If he didn't, we're in
20 a whole nother ballpark.

21 THE COURT: I will allow the answer.

22 MS. WHITE: Thank you.

23 THE COURT: Go ahead.

24 BY MS. WHITE:

25 Q. Do you have any reason to doubt the veracity of the

Special Agent Michael Fleener - Direct (White)

1 information you received from the foreign law enforcement
2 agency?

3 **A.** No, ma'am, I do not.

4 **Q.** Now, the foreign law enforcement agency did not turn
5 over to the United States the details of its investigation,
6 did it?

7 **A.** No, it did not.

8 **Q.** So we don't have any additional information to provide
9 about how far this IP address accessed the website, do we?

10 **A.** No, we do not.

11 **Q.** But we do know that they use the words, quote, was used
12 to access online child sexual abuse and exploitation
13 material, correct?

14 **A.** Yes. Yes, ma'am.

15 MS. WHITE: With the Court's indulgence.

16 BY MS. WHITE:

17 **Q.** Now, that affidavit goes on to describe how a Tor user
18 could access a hidden service like the target website; is
19 that correct?

20 **A.** Yes, ma'am.

21 **Q.** And then the warrant goes on to explain the nexus
22 between criminal conduct and the place to be searched.
23 That's in section nine, correct?

24 **A.** Correct, ma'am.

25 MS. WHITE: I don't believe there's been any

Special Agent Michael Fleener - Direct (White)

1 challenge to anything past where we've gotten thus far, Your
2 Honor.

3 BY MS. WHITE:

4 Q. So with that did you ever speak with anyone in the
5 foreign law enforcement agency directly?

6 A. No, ma'am, I did not.

7 Q. Did you ever access the defendant's computer during the
8 foreign law enforcement agency's investigation?

9 A. Can you repeat that? I missed the first part.

10 Q. Did you ever access the defendant's computer during the
11 investigation while he was on the website?

12 A. No, ma'am, I did not.

13 Q. Are you aware of the defendant's allegation that the
14 foreign law enforcement agency hacked into his computer?

15 MR. SCHLES: Objection, Your Honor.

16 That's misrepresenting my motion. In the government's
17 response, they repeatedly used the loaded phrase hacked
18 into. In -- in my --

19 THE COURT: What evidence or factual basis is
20 there for the assertion of the defendant in briefing that
21 the foreign law enforcement agency or anyone accessed this
22 computer?

23 MR. SCHLES: Your Honor, that is based on the way
24 the Tor network operates.

25 THE COURT: No. I'm asking what evidence is there

1 that they accessed his computer?

2 MR. SCHLES: The fact that they obtained the IP
3 address when this communication between the IP address
4 173.80.229 --

5 THE COURT: You don't need to keep rattling that
6 off --

7 MR. SCHLES: And --

8 THE COURT: Mr. Schles, slow down. I'm going to
9 ask a lot of questions and I need short answers, okay? If I
10 need an explanation, I'm going to do it.

11 If I access any website, don't they receive my IP
12 address?

13 MR. SCHLES: Not when one uses The Onion Router or
14 Tor network, Your Honor.

15 THE COURT: The website does not receive my IP
16 address.

17 Does any computer in the chain or in the web receive --

18 MR. SCHLES: The first --

19 THE COURT: -- my IP address?

20 MR. SCHLES: The first computer in the chain from
21 the user gets that address.

22 THE COURT: Now, does that computer or any other
23 computer in the Tor network then access the user's IP
24 address just because they accessed another address in the
25 Tor network?

1 In other words, is there some kind of automatic
2 reciprocity in access?

3 MR. SCHLES: Your Honor, the IP address is
4 broadcast only to the first relay computer; then it goes
5 through multiple, multiple random relay computers. By the
6 time it reaches the target website, there is no
7 identification possible simply by being the operator of the
8 target website. Some mechanism or method must have been
9 utilized; otherwise, it would be an impossibility for the
10 FLA to have the IP address.

11 THE COURT: Is there any evidence that the only
12 way to get the IP address was unlawful?

13 MR. SCHLES: I'm sorry, by what?

14 THE COURT: Is there evidence that you have that
15 the only way to get your client's IP address was by unlawful
16 means?

17 MR. SCHLES: Your Honor, I actually don't because
18 they won't disclose -- that's where the motion to compel
19 comes in. On the one hand, when you don't have any
20 evidence, but, B, we're not going to tell you how we did it.
21 You just have to take our word that we didn't do anything
22 else. And I can't prove a negative, no, Your Honor.

23 THE COURT: It seems simpler to me right now --
24 and I need you to persuade me otherwise. It seems to me
25 this is like having a reliable confidential informant in a

1 foreign law enforcement agency that's proven reliable in the
2 past and provides information that your client's address --
3 that computer at that address accessed a known child
4 pornography home site.

5 MR. SCHLES: I -- I -- I'm not disputing that this
6 foreign law enforcement agency does as a matter of custom
7 and practice collaborate with United States law enforcement,
8 cooperate with United States law enforcement and share
9 intelligence with United States law enforcement. That's not
10 the portion that I'm challenging the reliability.

11 I am challenging their statement that they didn't do
12 anything to virtually enter my client's computer and obtain
13 the IP address through the use of what they euphemistically
14 call network investigatory techniques, which does not sound
15 to an untrained layman as if that would be a code that is
16 transmitted to the other computers and presumably back to at
17 least the first relay computer, but they -- they refuse to
18 disclose basically saying it's classified so --

19 THE COURT: If they got his IP address from some
20 other computer, then he wouldn't have any standing to
21 challenge that, would he?

22 MR. SCHLES: I -- I -- I would agree that my
23 client only has a right to privacy in his own property, not
24 the property of others, Your Honor. I would not challenge
25 that.

1 And if the government did, in fact, obtain the IP
2 address through getting it off of some other source than my
3 client's computer, they should be required to disclose that
4 so that it can be examined. It's basically you have to take
5 our word. And it's not even their word. It's the word of
6 an unidentified individual with a foreign law enforcement
7 agency. The history between the foreign law enforcement
8 agency I don't doubt. This particular individual, we don't
9 know whether he's reliable. We don't know whether he's
10 competent. We don't know anything.

11 THE COURT: Magistrate judges and judges issuing
12 warrants rarely know if the representations from an
13 established law enforcement officer making an affidavit who
14 swears on an oath that the information I received is from a
15 source who has proven reliable in the past. That's
16 essentially what they're saying about this foreign law
17 enforcement agency. And they say that this is the
18 information they gave us.

19 Now, that's what they relied on and that's what the
20 magistrate judge relied on since he relied on the affidavit.

21 Your point is that it must be a lie?

22 It's of necessity a lie?

23 MR. SCHLES: It's not a lie. There's nothing
24 false.

25 THE COURT: Well, then, why isn't it sufficient as

1 a basis for probable cause?

2 MR. SCHLES: Essentially what the foreign law
3 enforcement agency says is that they are from a nation with
4 a rule of law, which we're not going to say what the nation
5 is, but I would not contest that representation, and that it
6 did not violate the laws of that nation.

7 It doesn't talk about whether or not they violated the
8 Fourth Amendment rights of my client in the privacy of his
9 computer in his home.

10 And my position would be if --

11 THE COURT: What is your -- other than what you've
12 said so far, what is your basis for saying that?

13 MR. SCHLES: Independent investigation and -- and
14 reading about various government operations that have been
15 conducted in very similar circumstances where foreign law
16 enforcement agencies working in concert with United States
17 law enforcement essentially use an unknown source code to --
18 and I don't -- I'm not a computer expert so I may be using
19 the wrong word, but to cause a user's computer to display
20 the IP address when otherwise it would not.

21 THE COURT: All right. Let me let Ms. White
22 respond to this.

23 I understand. I don't see any factual basis for what
24 you're saying, but I understand it.

25 MS. WHITE: Well, Your Honor, that's the

1 government's argument. This is pure speculation on
2 Mr. Schles's part. He has nothing to support it. He has no
3 paperwork, no witness, no affidavit, nothing.

4 What he has done is taken an argument that's presented
5 in other courts -- one in the District of Massachusetts and
6 one in the Eastern District of Virginia -- making the same
7 argument on behalf of defendants who were also caught up
8 using these same target websites in this investigation.

9 Those all failed.

10 THE COURT: What courts were those and what did
11 the judges say?

12 MS. WHITE: Your Honor, they both -- for the
13 motion to suppress, *U.S. v. Zachary Ellis Sanders* was in the
14 Eastern District of Virginia. And the judge said that there
15 was probable cause in the warrant.

16 THE COURT: What did -- what did the judge --
17 what's the judge's name and what did he say, if you have it?

18 MS. WHITE: Yes, Your Honor. I can, with the
19 Court's indulgence, pull out the opinion for you.

20 THE COURT: Take your time.

21 MS. WHITE: These arguments -- excuse me.

22 These memorandums and order were filed under seal in
23 those courts, so I don't believe Mr. Schles has had an
24 opportunity to see them. I can -- I have one copy I can
25 provide --

1 THE COURT: Is the judge's order under seal?

2 MS. WHITE: It's a sealed memorandum order.

3 THE COURT: Huh.

4 MS. WHITE: The -- these cases were put under seal
5 across the country and subject to protective orders. So any
6 documentation that was filed by the Court or party that had
7 any sensitive information it was sealed. And so in this
8 case, because there was a debate over the probable cause
9 that was addressed by the Court, the judges put those under
10 seal as well.

11 May I approach?

12 THE COURT: You may.

13 I find this entirely odd.

14 MS. WHITE: Well, while I don't want to go off on
15 a tangent, Your Honor, I'm simply trying to say that
16 Mr. Schles has taken an argument some other defense
17 attorneys have tried but without any factual support and
18 other courts have said no.

19 Now we're getting to where I thought we were going to
20 get to, which is we're talking about something totally
21 different than what's pled in the motion, but to address the
22 fact of the Fourth Amendment right to privacy with an IP
23 address, the defendant doesn't have a right to privacy.

24 The Fourth Amendment does not apply. And I would cite
25 the Court, *United States v. Farrell*. It's 2016 WL 705197:

1 A Tor user lacks any reasonable expectation of privacy
2 in that IP address information because it voluntarily shared
3 it with a third-party.

4 So Mr. Schles's claim that we violated his client's
5 Fourth Amendment right by taking his IP address, it's just
6 contrary to what the case law says.

7 In addition, Mr. Schles knows and --

8 THE COURT: I'm going to give these sealed orders
9 back to you. I don't want them.

10 MS. WHITE: Thank you, Your Honor.

11 In addition to knowing what the tip said, we also know
12 that the foreign law enforcement agency worked within the
13 confines of its own law -- and that's been provided to
14 defense counsel at Dugan Protected 397 -- that they took the
15 appropriate steps.

16 And I would respectfully remind the Court that a law
17 enforcement officer's not treated like an anonymous
18 confidential informant. And I think that the Court has
19 already alluded to that this morning, but just for the
20 purposes of the record we would point to *Yusuf*, 461 F.3d
21 374. And that says there's a distinction between
22 information provided by an informant and that provided by a
23 law enforcement officer or a government agency.

24 So while I respect the fact that Mr. Schles wishes he
25 had more information about the foreign law enforcement

1 agency's activities, that doesn't mean he's entitled to it
2 and it doesn't mean that Judge Tinsley signed a warrant
3 without sufficient probable cause.

4 THE COURT: All right. Anything that you want to
5 say further on that?

6 MR. SCHLES: Your Honor, I mean, we're kind of
7 broaching the motion to compel in an unconventional manner
8 here. I believe I do have a right to know what the evidence
9 is against my client and how it was obtained.

10 So for the purpose of this, for a motion to suppress,
11 on the basis that someone --

12 THE COURT: If I understand it, and fill me in if
13 I got this wrong, the evidence is that he received the
14 information he said he did in the affidavit from the foreign
15 law enforcement agency and on that hearsay basis presented
16 that to Judge Tinsley who found that was sufficient for
17 probable cause?

18 MR. SCHLES: That is correct, Your Honor.

19 THE COURT: All right. And you believe because it
20 is hearsay evidence you need to have the original speaker
21 present direct evidence before it could be relied upon by
22 the magistrate?

23 MR. SCHLES: I believe there needs to be some form
24 of corroboration not necessarily in that manner, but there
25 needs to be something more than someone, we won't tell you

1 who he is, obtained something in a way that we won't tell
2 you how it was done, but trust us your client's rights were
3 scrupulously observed.

4 I mean, it's a catch-22 situation. I can't put on
5 proof because they won't disclose it. And then they use my
6 lack of proof as a hammer against me.

7 THE COURT: I don't think that's the case, at
8 least that's not the way I understand it.

9 The way I understand it is this is very much like a
10 confidential informant who has proved reliable in the past
11 and whom the officer suggests to the magistrate judge has
12 provided information that is sufficient for probable cause
13 to issue a search warrant.

14 What's the difference between this case and that?

15 MR. SCHLES: Well, I -- I'm not agreeing with you
16 that the information provides sufficient probable cause, but
17 in addressing that, the difference is that when you're
18 talking about, you know, your typical informant, they
19 don't necessarily disclose the identity to the magistrate
20 who issues or they're seeking the warrant from, but there
21 has to be some basis for finding it reliable and also there
22 is no, generally, allegation that they are relying on
23 information that informant illegally obtained from the
24 target of the search warrant.

25 THE COURT: There is no evidence here except your

1 argument that it was illegally obtained. And your argued
2 basis for that, which is your understanding of how Tor
3 networks operate, if -- I'm -- I'm not persuaded by your
4 argument.

5 Do you have anything else to offer?

6 MS. WHITE: Your Honor, we would just simply note
7 that there was additional information about the reliability
8 of the foreign law enforcement agency.

9 THE COURT: I understand. I have everything
10 that's in the affidavit. I know what Judge Tinsley saw.

11 Is there any other question I haven't addressed that
12 you think I should with regard to the affidavit, Mr. Schles?

13 MR. SCHLES: Your Honor, I believe that my client
14 has the right and, you know, due process demands that he be
15 permitted to get more than here is the entirety of the
16 communications from the foreign law enforcement agency,
17 several paragraphs with boilerplate language.

18 And I should probably put this in the record rather
19 than just reading it, Your Honor, but basically: NCA
20 Intelligent Report. On 2019, 5/25, 14:09:59, UTC --

21 THE COURT REPORTER: I'm sorry --

22 THE COURT: Go slower. 14 what?

23 MS. WHITE: We have no objection to that --

24 MR. SCHLES: 14:09:59. That's -- that's a time --
25 the IP address which we're talking about was used to access

1 online sexual abuse and exploitation material.

2 THE COURT: It says that?

3 MR. SCHLES: It says that, but it's not true. At
4 least there's no evidence that it's true. The --

5 THE COURT: How do we distinguish that?

6 And I'm only going to ask it this last time because
7 I'm -- I know I'm beating a -- maybe not a dead horse, but
8 one that's on life support.

9 How is that different than a confidential informant
10 who's proved reliable time after time after time?

11 And here we've got an established law enforcement
12 agency of a country that I think you would concede is a
13 country that is a nation of law.

14 How is that police agency not better than the
15 confidential informant who's proved reliable?

16 MR. SCHLES: It may well be, but we don't know.

17 THE COURT: But if I'm the magistrate judge and
18 I'm looking at it and I'm allowed to consider confidential
19 information, hearsay, why is that not sufficient?

20 MR. SCHLES: Because it is misleading in that it
21 would lead a reasonable magistrate who is reading the
22 affidavit to believe that that IP address was, in fact, used
23 to access child exploitation and sexual abuse material when
24 there was no evidence provided by the foreign law
25 enforcement agency that happened.

1 The only evidence the FLA provided was specifically
2 that, that on May 25th, 2019, that address accessed the home
3 page of the target website for an undetermined period of
4 time.

5 There's no child pornography. There's no images.
6 There's no videos. It's just words on a screen at that
7 point. And they're not even words about child pornography.

8 And they go to great lengths to say, oh, you have to
9 register. There's no evidence whatsoever that that
10 happened, but the affidavit, the way it's written, it talks
11 about users are required to do this and they're required to
12 create a user name and they're required to create a password
13 and they're required to upload materials, that's speaking
14 generally. There's no evidence that my client or anyone
15 using that computer did any of those things, but the
16 affidavit was artfully constructed to create the impression.

17 There's also descriptions of things that are from the
18 descriptions clearly child pornography that were found on
19 that website on an undisclosed time, not necessarily the
20 time my client accessed it. And there's literally zero
21 reason to believe that my client accessed any of the files
22 described in the affidavit, but my position is the affidavit
23 was artfully constructed to lead a person reading it to
24 believe that is what happened when it's not. And I believe
25 it was deliberately by design --

1 THE COURT: Are you suggesting that the officer --
2 the hearsay rule doesn't apply, but is there -- are you
3 suggesting the officer didn't have a substantial basis for
4 crediting the hearsay from the foreign law enforcement
5 agency as credible?

6 MR. SCHLES: I think he had substantial basis to
7 credit one thing, that on May 25th, for an undetermined
8 period of time, which could have been a split second, that
9 IP address accessed the target website. Beyond that there
10 is nothing.

11 THE COURT: All right.

12 MS. WHITE: Well, Your Honor, just so we're clear,
13 that's not what the information says.

14 So Mr. Schles has agreed to half of what the
15 information says.

16 What the information says was that that IP address was
17 used to access online child sexual exploitation and abuse
18 material.

19 THE COURT: I quoted that to him before.

20 MR. SCHLES: And so Mr. Schles keeps saying, well,
21 he only went to the first page. That's not what the
22 information is.

23 I would just put on record -- and I know the Court's
24 aware -- we're arguing about probable cause for a search
25 warrant.

Special Agent Michael Fleener - Cross (Schles)

1 What Mr. Schles seems to want is every detail in an
2 investigation that has nothing to do with what his client is
3 charged with.

4 THE COURT: There's no constitutional right to the
5 discovery.

6 MS. WHITE: Thank you, Your Honor.

7 THE COURT: What I need to know, I'll probably ask
8 you. And I do read this stuff.

9 | Okay. Anything else?

10 MS. WHITE: Not on the motion to suppress, Your
11 Honor.

12 THE COURT: All right.

13 Mr. Schles, anything else?

14 MR. SCHLES: May I question the witness?

15	THE COURT: Huh?
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16 MR. SCHLES: May I cross-examine the witness?

17 THE COURT: Oh, sure.

18 MR. SCHLES: Thank you, Your Honor.

19 THE COURT: Sure. On the direct testimony he's
20 offered.

21	CROSS-EXAMINATION
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22 | BY MR. SCHLES:

23 Q. Agent Fleener, I believe you stated on direct you --
24 you never communicated with the foreign law enforcement
25 agency?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** That is correct, sir.

2 **Q.** Is your understanding the foreign law enforcement
3 agency first contacted the United States FBI?

4 **A.** From what I understand, that's correct.

5 **Q.** And the FBI notified Homeland Security, Boston?

6 **A.** Correct.

7 **Q.** And then when, I guess just from a general sense, it
8 was determined that the IP address was located in West
9 Virginia, that's when it was referred to you?

10 **A.** That is correct, sir.

11 **Q.** So that's when you came into the picture?

12 **A.** Yes, sir.

13 **Q.** And you obtained an administrative subpoena from
14 Suddenlink and one from AEP, which identified the account
15 holders for Suddenlink, obviously the IP address, and AEP I
16 guess was corroborating that the same name was on the power
17 bill for the home in Logan County as was on the Suddenlink
18 account, correct?

19 **A.** Correct, with one minor correction on the record. The
20 FBI actually subpoenaed Suddenlink and then forwarded me
21 that information when I got the initial lead. That
22 Suddenlink subpoena and response came to me with the initial
23 lead.

24 **Q.** Okay.

25 **A.** I did issue a subpoena to AEP.

Special Agent Michael Fleener - Cross (Schles)

1 Q. And once you had an -- and it was Eleanor Dugan,
2 Mr. Dugan's wife, who was the account holder for Suddenlink
3 and for AEP, correct?

4 A. That is correct, sir.

5 Q. And you obviously had the street address of the home?

6 A. Yes, sir.

7 Q. And did you have any information concerning the
8 activity of IP address 173.80.229.219, any information that
9 you personally were involved in on May 25th, 2019, or at any
10 other time in relation to the target website?

11 A. Other than what was sent to me by the FLA and FBI, no.

12 Q. And so you basically received a short blurb that was
13 forwarded to you that stated that IP address was, quote,
14 used to access online child sexual abuse and exploitation
15 material?

16 THE COURT: Go back to the beginning of your
17 reading there. Go back to the beginning of your reading of
18 that and read it slower.

19 MR. SCHLES: I'm sorry.

20 BY MR. SCHLES:

21 Q. The only information that you had was from this that
22 was forwarded to you that the IP address was used to access
23 online child sexual abuse and exploitation material. This
24 site was a forum that facilitated the sharing of child
25 sexual abuse and exploitation material, correct?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** Correct.

2 **Q.** At the time you completed the affidavit you had done no
3 investigation of that website, had you?

4 **A.** No, not the investigation. I looked over material that
5 was forwarded to me regarding that website.

6 **Q.** Did any of that material include any activity by that
7 IP address on the target website?

8 **A.** Other than what you're holding in your hand not
9 specifically, no.

10 **Q.** And did you make any effort to obtain information from
11 any other source to corroborate that?

12 **A.** No, I did not.

13 **Q.** And you also were informed that users were required to
14 create an account, parenthetical user name and password, in
15 order to access the majority of the material.

16 That is your understanding?

17 **A.** Did I understand that?

18 **Q.** Is it your understanding that --

19 **A.** Oh, yes, sir.

20 **Q.** -- users were required to create an account?

21 **A.** Yes, sir, I do.

22 **Q.** What is the basis for that understanding?

23 **A.** From the information that they sent me.

24 **Q.** This?

25 **A.** Correct.

Special Agent Michael Fleener - Cross (Schles)

1 **Q.** Do you have any information that any person using that
2 IP address took those steps and created an account,
3 established a user name and a password?

4 **A.** It was my understanding that if they made it that far
5 that's the step that they had to have taken.

6 **Q.** Well, couldn't they get that far and say this isn't
7 something I want to do and leave without ever looking at
8 anything that remotely resembles child pornography?

9 MS. WHITE: Objection. That's speculation and
10 that's not what the evidence here is.

11 THE COURT: What he said, as I understand it,
12 Mr. Schles, is that he relied upon the statement made by the
13 foreign law enforcement agency and that's it. That's what I
14 understood him to say.

15 BY MR. SCHLES:

16 **Q.** So you would agree that you of your personal knowledge
17 do not know what, if anything, was done on the target
18 website by that IP address.

19 That's correct, isn't it?

20 **A.** I only know exactly what the information that was
21 forwarded to me by the Department of Justice, CEOS, and the
22 FLA.

23 **Q.** So there's no evidence that an account was created?

24 **A.** Other than what you're holding in your hand, no, sir.

25 **Q.** There was no evidence that a user name was created?

Special Agent Michael Fleener - Cross (Schles)

1 **A.** No, sir, other than what I've already testified to.

2 **Q.** There was no evidence that a password was created?

3 **A.** Again, other than what I've testified to, no.

4 **Q.** There was no evidence that any files of any kind, let
5 alone child sexual abuse and exploitation material 50 to 100
6 megabytes, was uploaded to the target website?

7 **A.** Other than the website's requirements to be on it,
8 other than that, no, I have no specific evidence that that
9 was done.

10 **Q.** And isn't it true that in the absence of those steps it
11 would have been impossible for the person using that IP
12 address to access any child pornography on the child -- on
13 the target website?

14 **A.** I can't testify to impossible, but it seems unlikely
15 from what the website described.

16 **Q.** In your affidavit did you make that clear to the
17 magistrate that you had no evidence that the target -- or
18 the IP address did any of those steps or accessed any child
19 pornography from the target website?

20 **A.** In my affidavit I wrote exactly what was relayed to me
21 from a foreign law enforcement agency. I didn't make any
22 guarantees.

23 **Q.** Well, my question was did you inform the magistrate
24 that there was no evidence that that IP address actually --

25 MS. WHITE: Objection.

Special Agent Michael Fleener - Cross (Schles)

1 BY MR. SCHLES:

2 Q. -- attempted --

3 THE COURT: Sustained. He said what he said in
4 the affidavit. If you want to ask him if he told the
5 magistrate anything more than what's in the affidavit, you
6 can ask that.

7 MR. SCHLES: Thank you, Your Honor.

8 BY MR. SCHLES:

9 Q. And later in the affidavit or elsewhere in the
10 affidavit there are descriptions of files, which from my
11 reading you viewed those files for the descriptions in the
12 affidavit?

13 A. That is correct.

14 Q. And what date was that?

15 A. That I viewed them?

16 Q. That you viewed them.

17 A. I --

18 MS. WHITE: Objection. We're beyond the scope of
19 direct examination --

20 THE COURT: Sustained.

21 MS. WHITE: -- Your Honor.

22 THE COURT: Sustained. That has nothing to do
23 with probable cause here.

24 BY MR. SCHLES:

25 Q. Do you have any knowledge of what was available on the

Special Agent Michael Fleener - Cross (Schles)

1 target website on May 25th, 2019?

2 **A.** The descriptions that I put, three examples, are
3 examples of what would be found in that website if you
4 logged into it or if you gained access to it. Those are
5 three examples of what material you would be able to view.

6 **Q.** That specific material you believe was available on
7 May 25th, 2019?

8 **A.** From what I was told, that's correct.

9 **Q.** Told by whom?

10 **A.** By the foreign law enforcement agency and DOJC office.

11 **Q.** I thought you never spoke to the foreign law
12 enforcement agency?

13 **A.** From reading through their letter. I never spoke to
14 them, but the correspondence they sent me.

15 **Q.** Is there correspondence in addition to what's at Bates
16 396 and 397?

17 **A.** From what I understand, everything that CEOS gathered,
18 they gathered from the foreign law enforcement agency.

19 THE COURT: Is there anything --

20 **A.** That's my understanding.

21 THE COURT: Did you have anything else?

22 Did you --

23 THE WITNESS: Oh --

24 THE COURT: Did you have anything else?

25 THE WITNESS: No, sir, not at all.

Special Agent Michael Fleener - Cross (Schles)

1 THE COURT: All right.

2 BY MR. SCHLES:

3 Q. In paragraph 25 of your affidavit, on Bates Protected
4 84, page 24 of the affidavit itself, you wrote:

5 I am also aware from my training and experience the
6 review of detailed user data relating to one Tor network
7 based child pornography website found that it is exceedingly
8 rare for a registered website user to access that website
9 and never return?

10 You wrote that?

11 A. Yes, sir, I did.

12 Q. And that was based on an examination of a different
13 website, correct?

14 A. Training and experience over 20 years of doing this.

15 Q. I'm sorry?

16 A. Just my training and experience and communication with
17 other law enforcement officers. I know it's exceedingly
18 rare for somebody to visit a child --

19 Q. So it's not even related to your examination of a
20 specific website?

21 MS. WHITE: Objection. Asked and answered.

22 THE COURT: What are you trying to find out,
23 Mr. Schles?

24 MR. SCHLES: Yes, Your Honor.

25 BY MR. SCHLES:

Special Agent Michael Fleener - Cross (Schles)

1 Q. How did you determine that it was, quote, exceedingly
2 rare for a registered website user to access that website
3 and never return?

4 THE COURT: Access a registered website and never
5 return.

6 MR. SCHLES: I'm sorry, Your Honor?

7 THE COURT: It says access a registered website
8 and never return. It doesn't say that particular website.

9 MR. SCHLES: That's kind of my point, Your Honor.

10 THE COURT: Yeah.

11 Straighten me out if I'm not -- if my hearing aid's
12 turned off. For the record I don't have one, but it seems
13 to me he said this paragraph is based on his experience.
14 And he believes, based on that experience and his past
15 knowledge, that he thinks it's exceedingly rare to go to
16 such a site and never return. That's -- for whatever it's
17 worth, that's what it says. I don't -- I don't --

18 MR. SCHLES: Well --

19 THE COURT: I don't know what that adds to the
20 affidavit. If I were reviewing it for a search warrant,
21 that wouldn't be anything I would hang my hat on, but --

22 MR. SCHLES: Well, Your Honor, my point is
23 they're -- just because they say something doesn't mean that
24 it is probable cause.

25 It's exceedingly rare. First of all, that's a vague

1 term. I don't know what exceedingly rare means, if it's one
2 in ten, one in a hundred, one in a million.

3 Secondly, it is not specific and it is misleading
4 because, again, there is no evidence that this IP address
5 was used to register an account on that website. And if you
6 have an unregistered person who on one occasion that's all
7 we have, this is a way to obscure the fact that there is, in
8 fact, evidence of only one perhaps instantaneous visit with
9 training and experience that maybe something else happens.

10 THE COURT: I've got your argument. I've
11 sustained the objection.

12 Tell me if this isn't the law: A tip from federal a
13 law enforcement agency is presumptively credible.

14 Is that the law?

15 MR. SCHLES: Yes.

16 THE COURT: Past working relationships between the
17 government and other law enforcement agencies are -- bolster
18 an affidavit?

19 MR. SCHLES: I'm sorry?

20 THE COURT: Bolster an affidavit. Past working
21 relationships bolster.

22 MR. SCHLES: Yes.

23 THE COURT: You asked -- the United States works
24 with this foreign law enforcement agency. I think we've --

25 MR. SCHLES: I -- I agree they work so closely

1 that there's an agency relationship, Your Honor.

2 THE COURT: Right. And they use it to catch
3 predators or they have?

4 MR. SCHLES: I'm sorry, Your Honor?

5 THE COURT: Well, I guess that's not in the
6 evidence that they use it -- the information and cooperation
7 with that particular agency to catch predators.

8 MR. SCHLES: Well, I would respectfully disagree
9 with that, Your Honor.

10 THE COURT: I say that's probably not in the
11 evidence, is it?

12 Okay. You know, I just wondered if there was anything
13 specific that you had seen that made you think that their
14 cooperation extended to this area of law enforcement.

15 MR. SCHLES: Just independently reading on the
16 sting operation that they run that this goes on. There was
17 Operation Playpen. There's multiple of these, Your Honor,
18 where there is obviously a close history of collaboration.
19 The foreign law enforcement agency is clearly acting with
20 the prior knowledge and consent of U.S. law enforcement.

21 And when they know that they are essentially in a
22 cooperative relationship where if you obtain information
23 you'll give it to me, if I obtain information I'll give it
24 to you, but they're acting as agents for each other even in
25 the lack of a formal agreement, but I've also asked in the

1 motion to compel for disclosure if there are any agreements,
2 memorandums or understandings so that we can explore that.

3 THE COURT: I'm going to deny your motion to
4 compel and your motion for additional evidence. I don't
5 think under the facts of this case and based on the
6 arguments presented in your briefing here today and
7 considering the government's responses that you're entitled
8 to it. So that -- we got rid of those motions.

9 The only thing we have left here is this motion to
10 suppress.

11 Do you have any other arguments on that?

12 MR. SCHLES: Yes, Your Honor.

13 Basically my argument is twofold. The affidavit itself
14 fails to establish probable cause. Take out all the
15 boilerplate, take out all the training and experience, take
16 it's my opinion, which is essentially what we're dealing
17 with.

18 You have the sum total of evidence that is specific to
19 Mr. Dugan's IP address is that on May 25th, 2019, the
20 computer with that IP address accessed that target website
21 one time -- one time for an undisclosed duration, which
22 could have been as brief as a blink of an eye.

23 There's no evidence whatsoever it was used to view,
24 download, disseminate, receive anything that would be child
25 pornography. And just the mere fact that on one occasion

1 that target website was accessed is insufficient to
2 establish probable cause.

3 It's different than *Bosyk* or *Bosyk* -- I'm not sure how
4 it's pronounced -- because that one occasion in *Bosyk* the
5 person was looking at child pornography and that was not in
6 dispute.

7 Here there's no evidence that that computer -- this
8 computer was used to view child pornography, to --

9 THE COURT: Except what was received from the
10 foreign law enforcement agency and what they said and what's
11 been read to you by me and by --

12 MR. SCHLES: They used the vague phrase child
13 exploitation and abuse material without describing it. And
14 we have the screenshots that I was -- there's no child
15 sexual abuse in any of these pages. There's some Russian
16 and some English that looks like any number of forums or
17 anything. There's not a single image. There's not even a
18 drawing or a silhouette, which I think was the one in
19 Playpen, where it was a logo that was obviously a sexualized
20 content. There's none of that.

21 A person could, in fact, be on the Tor website for any
22 number of reasons, legitimate reasons, be it some -- someone
23 has posted a link. You click on that without knowing what
24 it is because it is kind of a random series of numbers and
25 letters. You don't know it's taking you to a child porn

1 site. You end up on this page that really discloses nothing
2 and you navigate away. There's no probable cause that
3 person was attempting to facilitate child pornography.

4 THE COURT: Do you have anything to say in
5 closing? I'll let him respond.

6 MS. WHITE: Thank you, Your Honor.

7 I've listened to Mr. Schles for over an hour. And I
8 would just caution the Court that just because he says it
9 doesn't mean it's true.

10 Mr. Schles keeps saying it was accessed one time. And
11 Mr. Schles keeps saying that he didn't get past the home
12 page. And Mr. Schles keeps saying that he didn't actually
13 see any child pornography. All of that is speculation.

14 What we do know is what the warrant said. It described
15 how the Tor network works. It described the foreign law
16 enforcement agency's information verbatim and that was this
17 IP address was used to access online child sexual abuse and
18 exploitation material and then it describes how the website
19 worked.

20 THE COURT: All right.

21 MS. WHITE: That coming from a credible law
22 enforcement agency with a history of reliable information is
23 sufficient probable cause.

24 Now, I heard Mr. Schles say that there's an agency
25 relationship. Well, he respectfully just made that up. He

1 has no evidence to support that. And I'm a little bit
2 surprised to hear it. I asserts the United States had prior
3 knowledge of this investigation. He doesn't base that on
4 anything.

5 And, Your Honor, I've sat quietly because I did not
6 want to offend the Court, but at this point I would like the
7 Court to carefully consider what, if any, evidence
8 Mr. Schles has shown you to present his speculation. He can
9 say whatever he wants, but the affidavit and everything in
10 it has been backed up by the documentation and the officer's
11 testimony. We believe that that was sufficient probable
12 cause for Judge Tinsley to grant the warrant.

13 THE COURT: Anything to say in closing,
14 Mr. Schles?

15 MR. SCHLES: I'm not speculating that the only
16 evidence in the affidavit in support of the application for
17 the search warrant is that on a single occasion on May 25th,
18 2019, that IP address was used to access the home page of
19 the target website. And that's the sum total of the
20 evidence that is specific to that IP address and to my
21 client's case. All the rest of it is just generalities,
22 specifics, speculation. None of it has anything to do with
23 my client.

24 You're right about *Bosyk* and the single click. In that
25 case that was found sufficient to establish probable cause

1 in the absence of any corroboration. Different situation
2 because it was a single click to a video of child sexual
3 activity. This was a single click to a page of words.

4 THE COURT: All right. Thank you.

5 I overrule the motion to suppress. I find that the
6 affidavit from the magistrate was sufficient as a basis for
7 probable cause. The fact that the affidavit relies -- or
8 contains within it the information from the foreign law
9 enforcement's site and that the officer relied upon that and
10 the magistrate relied upon that is sufficient basis for
11 probable cause to believe that the facts that he accessed
12 the site for child pornography is very plausible and
13 probable.

14 It's improbable to believe he inadvertently accessed
15 this site. They don't -- the government has no obligation
16 to prove that he actually saw pornographic material or that
17 he downloaded it. They have enough -- more than enough
18 evidence to believe that it's probable and indeed plausible
19 that he did so.

20 In any event, even if there were not sufficient
21 evidence, the issuance of this warrant by a magistrate judge
22 of this court, after review of the lengthy materials in the
23 affidavit based on the foreign law enforcement agency's
24 materials, is certainly sufficient for the officer to
25 believe in good faith that the warrant was lawful. And

1 there's no indication that the persons who executed the
2 warrant had any reason to question the lawfulness or
3 legitimacy of the warrant.

4 Anything further to come before the Court?

5 MS. WHITE: No, Your Honor.

6 Thank you.

7 MR. SCHLES: Your Honor, if I may at this time, I
8 will follow it up with a written motion, but I would move to
9 continue the trial date. In light of the Court's rulings
10 today, I'm going to need some additional time.

11 THE COURT: I'm going to grant your motion right
12 now and give you a new date.

13 Robin?

14 THE COURTROOM DEPUTY CLERK: How long does he
15 need?

16 THE COURT: Tell me the date.

17 THE COURTROOM DEPUTY CLERK: That was only a week.

18 THE COURT: How about the 17th?

19 MR. SCHLES: 17th of May?

20 THE COURT: Uh-huh.

21 MR. SCHLES: Hold on, Your Honor.

22 THE COURT: I've got other -- as you probably
23 know, I've got other trials and we're going to get jammed
24 up. If we don't do it then --

25 MR. SCHLES: I am available the week of the 17th,

1 Your Honor.

2 THE COURT: Is that all right?

3 MR. SCHLES: Yes, that works for me.

4 THE COURT: Is that okay for you?

5 MS. WHITE: Yes, Your Honor. I believe my agent's
6 available. I'll make myself available as well.

7 THE COURT: All right.

8 The motion to seal, I'm going to grant it. I grant the
9 motion to seal at the present time. I'm going to review
10 them later. I have some questions about the breadth of what
11 is sealed, but I'll deal with that at a later time.

12 I'm always very conscious of the public's presumptive
13 access to materials in criminal matters. I feel like that
14 the motion to seal may be overly broad. And as a courtesy
15 to the Court I would ask the government and the defendant to
16 review those motions and perhaps narrow them for me, but at
17 this time they're granted as stated.

18 MR. SCHLES: For what it's worth, Your Honor, I
19 filed my materials under seal out of an abundance of caution
20 because it is a very broad protective order.

21 I have no objection to it being filed in the normal
22 fashion without seal, but I don't really have a strong
23 opinion either way.

24 THE COURT: I'll take that into account and I'll
25 let the government sort through what they feel is essential

1 to be sealed.

2 MS. WHITE: Thank you, Your Honor.

3 Would you like me just to submit an amended response
4 and redact what we would like to be kept under seal?

5 THE COURT: I think that will work.

6 Do you agree, Mr. Schles?

7 MR. SCHLES: That works with me.

8 THE COURT: That may be done.

9 I tell you what, I just won't enter the order granting
10 the motion until I consider this.

11 How about that?

12 MS. WHITE: I'll get that to the Court.

13 THE COURT: In the meantime it's still pending.

14 MS. WHITE: Thank you, Your Honor.

15 THE COURT: All right. And it's pending under
16 seal.

17 Anything else?

18 MR. SCHLES: No, Your Honor.

19 THE COURT: All right. I'll see you on the 17th.
20 Court's in recess until what time?

21 THE COURTROOM DEPUTY CLERK: We're done for today.

22 THE COURT: We're adjourned for the day.

23

24 (Proceedings concluded at 11:20 a.m., April 29, 2022.)

25

1 CERTIFICATION:

2 I, Kimberly Kaufman, Official Court Reporter, certify
3 that the foregoing is a correct transcript from the record
4 of proceedings in the matter of United States of America,
5 Plaintiff v. Raymond Dugan, Defendant, Criminal Action No.
6 2:21-cr-00127, as reported on April 29, 2022.

7
8 s/Kimberly Kaufman, RMR, CRR, CRCJanuary 15, 2023

9 Kimberly Kaufman, RMR, CRR, CRC

DATE

10
11
12 - - - - -

13 CERTIFICATION:

14 I, Kimberly Kaufman, Official Court Reporter, certify
15 that the foregoing is a correct redacted transcript from the
16 record of proceedings in the matter of United States of
17 America, Plaintiff v. Raymond Dugan, Defendant, Criminal
18 Action No. 2:21-cr-00127, as reported on April 29, 2022.

19
20 s/Kimberly Kaufman, RMR, CRR, CRCMarch 2, 2023

21 Kimberly Kaufman, RMR, CRR, CRC

DATE